Supreme Court, U.S.
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No. 00-1497

IN THE

Supreme Court of the United States

CITY OF YONKERS,

Petitioner,

v.

UNITED STATES AND YONKERS BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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BRIEF OF AMICUS CURIAE CENTER FOR INDIVIDUAL RIGHTS IN SUPPORT OF THE PETITIONER

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QUESTIONS PRESENTED

1. What standard of review should be applied to a court's race-conscious remedial order designed to eradicate the vestiges of past discrimination in a city's housing policy?

2. What actions must a city take to eradicate the vestiges of past discrimination where it previously has had a discriminatory housing policy?

PARTIES TO THE PROCEEDING

Petitioner is the City of Yonkers. It was the defendant in the District Court and appellant in the Court of Appeals.

Respondents are the United States and Yonkers Branch, National Association For The Advancement Of Colored People. The United States was a plaintiff in the District Court and the Yonkers Branch, NAACP intervened as a plaintiff. They were appellees in the Court of Appeals.

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INTEREST OF AMICUS CURIAE

The Center for Individual Rights ("CIR") is a public interest law firm. It has participated in the litigation of numerous cases concerning the use of race by government officials, including *Reno v. Bossier Parrish*, 528 U.S. 320 (2000) in this Court.

CIR believes that the court below ignored an exceedingly important question: whether in eliminating the vestiges of a city's discriminatory housing policy, the city must reduce the actual racial identifiability of specific neighborhoods. Because this Court has given different answers to similar questions in different contexts, a careful analysis of housing, and the manner in which government regulates it, is needed. We hope to provide a start to that analysis here.[1]

STATEMENT OF THE CASE

CIR adopts the statement of the case in the petition. We highlight only a few significant facts.

The original 1986 Housing Remedy Order ("HRO") had two significant parts for the creation of additional affordable housing in Yonkers, Part IV and Part VI. Part IV required the City to submit a Housing Assistance Plan to receive funds from the federal Department of Housing and Urban Development ("HUD") for 200 units

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[1] Pursuant to Rule 37.2(a) of the Rules of this Court, all parties have consented to the filing of this brief.

Pursuant to Rule 37.6, amicus curiae CIR affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

of public housing to be located on sites provided by the City. The parties agreed upon the sites for these units of public housing in Section 2 of the 1988 First Remedial Consent Decree. App. 120a-121a. Each of these sites were in East and Northwest Yonkers, and the units were built and occupied by 1994. Earlier, in 1991, the District Court gave then-residents of Yonkers public housing second priority for these units (after those on the waiting list for the units). App. 152a-53a.

Part VI of the HRO called for the creation of additional subsidized and/or affordable housing units in East and Northwest Yonkers. In Section 12 of the 1988 First Remedial Consent Decree, the parties agreed that 800 units was an appropriate goal. App. 125a. Section 13 of that same Consent Decree created a presumption in favor of using "mandated incentives" for private developers to create these units. App. 125a-26a. *See also* App. 141a-42a (similar priority in Section 5 of 1988 Long Term Plan Order).

When the city did not agree to a long-term plan consistent with (and called for by) the Consent Decree, the government moved for entry of its own plan, and the District Court entered it as the 1988 Long Term Plan Order. That order called for a minimum of 20% "affordable" units in all new construction multi-family developments in East and Northwest Yonkers until the goal of 800 was reached. App. 134a-36a. Section 4(f) of the Long Term Plan Order set forth "occupancy priority" in the affordable units to (1) residents of public or subsidized housing in Yonkers ("Priority 1"), (2) residents of Yonkers ("Priority 2"), and (3) persons employed in Yonkers ("Priority 3"). Section 8 listed various "mandated incentives" that the District Court instructed Yonkers to pro-

vide, including increasing the maximum heights for buildings, increasing the maximum floor areas, granting various tax abatements, and waiving certain fees. App. 144a-45a.

In October 1993, the Supplemental Long Term Plan Order modified the plan again. Specifically, the Court agreed with Yonkers that a number of affordable units (*viz.*, 250) could be provided through existing housing. App. 165a. At the same time, the Court ordered preconstruction activity to proceed on three sites that had been identified as sites for new construction: Yonkers Avenue, Cross Street, and Hoover Road. App. 158a.

Throughout this process, the District Court appointed and created various offices and officials to assist it in implementing the remedy. It ordered Yonkers to create a Fair Housing Office ("FHO") with the general responsibility of implementing fair housing policy in Yonkers and to conduct "educational" programs "to elicit support for the remedial efforts of the City . . . and to promote racial harmony in Yonkers." App. 101a. It created an Affordable Housing Trust Fund ("AHTF") to be administered by the FHO, which would use funds from HUD to foster private development of low and moderate income housing. App. 109a, 166a-67a. It ordered the creation of a Fair Housing Implementation Office ("FHIO") within the FHO to further facilitate remedial activities. App. 148a-49a. In the 1993 Supplemental Long Term Plan Order, it appointed a Housing Special Master pursuant to Rule 53 of the Federal Rules of Civil Procedure. App. 159a. Recognizing that the implementation of the new construction provisions of the remedy was "far beyond the capacity of the FHIO alone" (App. 164a), it gave the Housing Special Master further authority to appoint a third party for implementation of the new construction provisions. It also gave

the Special Master authority to appoint a third party for implementation of the existing housing provisions of the remedy. App. 165a.

In 1996, after recognizing that "the concept of having within the city someone or some group whose primary responsibility was to report to the Court didn't work well" (App. 175a), the District Court returned authority for implementing the remedy to the City of Yonkers in the Second Supplemental Long Term Plan Order.[2] In addition to ordering new construction to proceed on the three sites identified in the initial Supplemental Long Term Plan Order, the Second Supplemental order set a goal of providing 100 units of affordable housing per year using either new construction or existing housing. App. 178a-79a. According to that order a unit would count towards the City's obligation to provide "affordable" housing if "the *location* of the unit furthers the integrative purposes of the [Long Term Plan Order]" (App. 181a, emphasis added).

Despite this emphasis on the location of the unit as meeting the court's integrative purpose, the plaintiff-intervenors objected to the implementation of the plan several years later because it led to Yonkers subsidizing some moves that were not "integrative," *i.e.*, where whites

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[2] In addition, the court, with the input of plaintiff-intervenor, became more skeptical of its earlier emphasis on homeownership for those who had been residents of Yonkers public housing, *i.e.*, those who could qualify as Priority 1 applicants. App. 191a-92a (plaintiff-intervenor's counsel asserting that there is "a mismatch between a program that is highly homeowner oriented and the housing of priority 1 households. That is largely a financially driven problem. Obviously, there are psychological problems. People have rented their entire lives and know rent housing . . . and loathe home ownership").

moved to majority white neighborhoods and/or minorities moved to majority minority neighborhoods. The District Court agreed with this objection, and, in the Third Supplemental Long Term Plan Order, modified the criteria so that Yonkers would not get credit toward the goal of 100 units per year for providing affordable housing that facilitated such moves. Specifically, the Third Supplemental order provided that the city would only get credit, and AHTF moneys could only be expended, for the subsidization of (1) Priority 1 applicants, and minority Priority 2 and 3 applicants, seeking to move to majority white neighborhoods in East and Northwest Yonkers and (2) non-minority Priority 2 and 3 applicants seeking to move to majority minority neighborhoods in East and Northwest Yonkers. App. 28a.[3] The Third Supplemental order, then, treats white applicants and minority applicants for subsidized housing differently; because of the current racial make-up of East and Northwest Yonkers, the former will rarely have moves to those areas subsidized while the latter almost always will.

SUMMARY OF ARGUMENT

The "analysis" of the Second Circuit in this case was superficial in two respects. First, it assumed that the "strict scrutiny" standard assumed in *United States v. Paradise*, 480 U.S. 149 (1987) was the *only* relevant standard. App. 16a. "Strict scrutiny" usually governs the

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[3] Most Priority 1 applicants are minorities. Nonetheless, it is rather odd that the City apparently can get credit for subsidizing the moves of the few white Priority 1 applicants into majority white neighborhoods, a phenomenon that seems completely inconsistent with the District Court's purportedly integrative objective. (The City does not get credit for facilitating the moves of minority Priority 1 applicants into majority minority neighborhoods.)

analysis of race-conscious measures *voluntarily* adopted by state actors. When remedial measures are imposed by a federal court on state actors, additional factors must be considered. Second, the Second Circuit also assumed that the racial identifiability of particular neighborhoods is a "vestige" of past housing discrimination by the City of Yonkers that must be eliminated under the Fourteenth Amendment. App. 17a. But, "racial identifiability" is not always a "vestige" that should or even can be eliminated, and the court below failed to analyze whether it should be in the housing context.

Certainly, the fact that the Second Circuit did not consider these questions, or any of the case law cited below, suggests that there is confusion about the standards to be applied. Indeed, housing presents an excellent opportunity to apply this Court's principles to a new and important context. This Court should take this opportunity to clarify the law.

REASONS FOR GRANTING THE PETITION

Discrimination frequently produces segregation and racial identifiability. The Equal Protection Clause prohibits discrimination, and gives courts the authority to halt it, and to remove the "vestiges" of that discrimination. But whether "racial identifiability" is a "vestige" that a court is authorized to address depends upon context.

Where grade school desegregation is concerned, this Court has concluded that racial identifiability is a "vestige" that must be eradicated so long as the racial identifiability can be attributed to the past *de jure* system. *Green v. School Board of New Kent County*, 391 U.S. 430 (1968); *Freeman v. Pitts*, 503 U.S. 467, 486 (1992) ("The

Green factors are a measure of the racial identifiability of schools in a system that is not in compliance with *Brown* [*v. Bd. of Education*, 347 U.S. 483 (1954)], and we instructed the District Courts to fashion remedies that address all these components of elementary and secondary education").

So, too, when a state had been recalcitrant in opening its employment opportunities as state troopers to minorities, this Court has held that a district court can impose racial quotas to reduce the racial identifiability of various positions in that department. *United States v. Paradise*, 480 U.S. 149, 170 n.20 (1986) ("The one-for-one [black to white promotion] mechanism was employed not to punish the Department's failure to achieve racial balance, but to remedy the Department's refusal to fulfill the commitment made in consent decrees to implement a promotion procedure without adverse impact on blacks and to eradicate the effects of its past delay and discrimination. The racial imbalances in the Department are properly characterized as the effects of the Department's past discriminatory actions . . . ").

As discussed below, this Court has focussed on racial identifiability in grade schools and employment for reasons unique to those contexts, *viz.*, the significant control that school districts have over student assignments and employers have over promotions and hiring.

In contrast, in the state operation of 4-H Clubs and other clubs providing services to farmers, this Court has held that the elimination of racial restrictions is the only obligation of the state, and that the state need not do more than that to meet its obligations under the Fourteenth Amendment. *Bazemore v. Friday*, 478 U.S. 385, 408

(1986). This was so despite the fact that the vast majority of these clubs continued to consist of members of a single race even after the elimination of any racial restrictions. *Id.* ("The mere continued existence of single-race clubs does not make out a constitutional violation"; the obligation in *Green* to desegregate "has no application to the voluntary associations supported by the Extension Service").

Finally, in the context of eradicating a *de jure* system of higher education, this Court hewed a middle path. As in *Bazemore*, this Court has rejected *Green*-type balancing tests requiring the diminution of racial identifiability. *United States v. Fordice*, 505 U.S. 717, 730 n.4 (1992). *See also id.* at 745 (Thomas, J., concurring) (Court's standard "is far different from the one adopted to govern the grade-school context in [*Green*]"). But, it also distinguished *Bazemore*, and concluded that the lower courts should not ignore racial identifiability altogether. Rather, this Court held that, beyond establishing race-neutral policies, the state had the further obligation of eliminating unjustified educational policies that were (1) traceable to the *de jure* era, and (2) had segregative effects. *Fordice*, 505 U.S. at 731. Thus, a *de jure* era policy that *promoted* racial identifiability because it *restricted* private choice was a "vestige" of past discrimination and had to be eliminated.

1. In *Paradise*, this Court assumed that strict scrutiny was the highest standard of scrutiny that could be applied, and concluded that the court remedy there was constitutional because it met the requirements of strict scrutiny. *Paradise*, 480 U.S. at 166-67. The Second Circuit in this case made the same assumption, and reached the same conclusion. App. 16a.

In cases other than *Paradise*, however, this Court has suggested that other factors must be considered when analyzing the limits of the remedial powers of a court in an Equal Protection Clause case. Those remedial powers are limited to what the Constitution *requires* to eliminate the vestiges of past discrimination. *E.g.*, *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 200 (1972) (where Minnesota apportionment scheme violated the Constitution, action of three-judge court in drastically reducing the size of the Minnesota legislature "is *not required by the Federal Constitution* and is not justified as an exercise of federal judicial power" (emphasis added)).

In limiting the Constitutional *obligations* of a formerly dual system to the elimination of *de jure* era policies having segregative effects in *Fordice*, the Court did not purport to apply "strict scrutiny." (This Court never used the words "strict scrutiny" in either *Fordice* or *Bazemore*.) In other situations, this Court has also suggested that the ability of state actors voluntarily to remedy the present effects of past discrimination, although subject to strict scrutiny, may extend beyond what a district court might order. *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 583 (1984) (in reversing a district court modification to a consent decree, where the modification precluded a city from using its seniority system to lay off firefighters because the layoffs would have a disparate impact on African Americans, the Court rejects the argument that the modification was permissible because it did no more than what the city could have done voluntarily; "Whether the City, a public employer, could have taken this course without violating the law is an issue we need not decide. The fact is that . . . the City took no such action and that the modification of the decree was imposed over its objection"). *Cf. Regents of the University of*

California v. Bakke, 438 U.S. 265, 379 (1978) (Brennan, J., concurring in the judgment in part and dissenting in part) (although State university could remedy effects of societal discrimination by establishing a set aside for qualified minority applicants, "it is generally free, as far as the Constitution is concerned, to abjure granting any racial preferences in its admissions program").

So, too, the supposition of those state laws that have restricted the use of racial preferences is surely that even those state laws that meet strict scrutiny are not necessarily *required* by the Constitution (and thus of the type that a district court could order). Otherwise, such state laws would be a nullity. *Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 709 (9th Cir. 1997) (upholding the constitutionality of California Proposition 209, eliminating racial preferences in public employment, education, and contracting; "To hold that a democratically enacted affirmative action program is constitutionally permissible because the people have demonstrated a compelling state interest is hardly to hold that the program is constitutionally required").

Here, of course, the City of Yonkers has not voluntarily undertaken the race-conscious plan in the Third Supplemental Long Term Plan Order. Rather, that plan has been imposed on it by the district court in this action. A district court may order race-conscious plans if the Constitution requires them to eradicate the vestiges of past discrimination, but they are not necessarily coextensive with the plans that state actors can adopt voluntarily. Principles of judicial restraint, and respect for the autonomy of state officials, should be considered when court orders are scrutinized. *United States v. Yonkers Bd. of Education*, 837 F.2d 1181, 1236 (2d Cir. 1987) (district

court's housing remedy order is valid because it "intrudes no more than necessary on the City's prerogatives"). To the extent the courts below went beyond what the Constitution requires, then they did "intrude . . . more than necessary on the City's prerogatives." Courts should do everything appropriate to remedy constitutional violations, but beyond that they have no authority to operate state or municipal government.

This Court should grant the writ to clarify the standard that is applicable to court orders designed to eradicate the vestiges of past discrimination, and the relationship of that standard to "strict scrutiny."

2. No matter what the standard, this Court must determine whether the "racial identifiability" of a neighborhood is a "vestige" or "effect" of past discrimination by the City of Yonkers properly remedied through a racially-discriminatory program.

No one disputes that the City of Yonkers engaged in unconstitutional discrimination by limiting public housing to the Southwest portion of the city for racial reasons. Nor can anyone dispute that such discrimination has contributed to the racial identifiability of various neighborhoods in Yonkers -- in short, segregation. Invidious discrimination almost always leads to some racially identifiable group. *Bazemore v. Friday*, 478 U.S. at 414 (Brennan, J., dissenting in part) ("There is no room to doubt, and the Court does not even bother to argue otherwise, that one of the *effects* of prior discrimination is the legacy of single-race Clubs that still exist in North Carolina" (emphasis in original)). But as *Bazemore* itself demonstrates, the Constitution does not require the elimination of *every* effect of past discrimination, and sometimes it does

not require the elimination of racially-identifiable groups.

Why does the Constitution require the amelioration of racial identifiability in certain groups (elementary and secondary schools in *Green*, employees in *Paradise*), but not in others (state-run 4-H clubs in *Bazemore*, previously *de jure* segregated colleges in *Fordice*), despite the fact that the segregated groups are all "caused" to some significant degree by prior discriminatory policies? With respect to grade school education, this Court in *Bazemore* explained that racial balancing was appropriate because "schoolchildren must go to school" and "school boards customarily have the power to create school attendance areas and otherwise designate the school that particular students may attend." *Bazemore*, 478 U.S. at 408. To put the point another way, the state is so heavily involved in the racial make-up of its schools, a court might be skeptical of racial imbalance that results from any purportedly-neutral "process." Since the state had much less involvement in picking members for the clubs involved in *Bazemore*, no such skepticism was appropriate; the *continuing* racial identifiability of those clubs was not caused by *current* state policies.

State employment presents a similar issue, but also has other unique characteristics. A state employer has significant discretion over the criteria it uses to hire or promote. Where it has engaged in a long history of discrimination, as in *Paradise*, a "quota" that changes the racial identifiability of a group of employees may be considered an appropriate stopgap measure until genuinely neutral and validated employment criteria are in place. Indeed, in *Paradise*, the "quotas" were to be used only until validated promotion procedures were in place. *Paradise*, 480 U.S. at 178 ("Most significantly, the one-for-one

requirement is ephemeral; . . . . The requirement endures only until the Department comes up with a procedure that does not have a discriminatory impact on blacks"). *Cf. id.* at 197-98 (O'Connor, J., dissenting) ("The order at issue in this case clearly had one purpose and one purpose only -- to compel the Department to develop a promotion procedure that would not have an adverse impact on blacks . . . The order imposed the promotion quota only until the Department developed a promotion procedure that complied with the consent decrees. If the order were truly designed to eradicate the effects of the Department's delay, the District Court would certainly have continued the use of the one-for-one quota even after the Department had complied with the consent decrees"); *Local 28 of the Sheet Metal Workers, Int'l Ass'n v. E.E.O.C.*, 478 U.S. 421, 450 (1986) ("a district court may find it necessary to order interim hiring or promotional goals pending the development of nondiscriminatory hiring or promotion procedures"). Again, the amelioration of the "vestige" of a racially-identifiable group (employees) seems to be combined with a strong sense that the racial remedy is a prophylactic to ensure that *current* practices are non-discriminatory. *See also Sheet Metal Workers*, 478 U.S. at 448 ("Where an employer or union has engaged in particularly longstanding or egregious discrimination, an injunction simply reiterating Title VII's prohibition against discrimination will often prove useless and will only result in endless enforcement litigation. In such cases, requiring recalcitrant employers or unions to hire and to admit qualified minorities roughly in proportion to the number of qualified minorities in the work force may be the only effective way to ensure the full enjoyment of the rights protected by Title VII.").

Moreover, because the pool of potential beneficia-

ries is relatively small in an employment discrimination case, there is a much higher likelihood that the beneficiaries of the "desegregating" quota were, in fact, victims of the prior discriminatory practice. While this may not be true for every beneficiary, this Court in *Paradise* suggested that it was generally true there. *Paradise*, 480 U.S. at 173-74 ("To permit ad hoc decisionmaking to continue and allow only 4 of 15 slots to be filled by blacks [as suggested by the defendant Department of Public Safety] would have *denied relief to black troopers who had irretrievably lost promotion opportunities*" (emphasis added)).

In contrast, when extension clubs or colleges are concerned, the state exercises less control over which one an applicant applies to and admissions criteria are often minimal and fairly standard. In addition, new applicants will much less frequently be likely victims of the previous *de jure* system of higher education. Thus, so long as the state is not improperly influencing private choice with its current policies, racial balance is not needed to insure that current procedures are non-discriminatory. Nor is it needed to provide complete remedies to individual past victims of discrimination.

Of course, racial identifiability itself may be a factor influencing private choice. That is, as a practical matter, an African American applicant for college may be more likely to choose an historically black institution than an historically white institution, and the opposite might hold true for white applicants. *Podberesky v. Kirwan*, 38 F.3d 147, 160 n.13 (4th Cir. 1994) (noting the high numbers of African Americans attending historically and predominantly African American schools). But neither *Bazemore* nor *Fordice* ever suggested that the Constitution requires the elimination of *this* influence on private choice,

although it is surely a vestige of the past *de jure* system. *Fordice*, 505 U.S. at 731 (noting that, in *Bazemore*, "any racial imbalance resulted from the wholly voluntary and unfettered choice of private individuals" even though the segregated clubs had been previously supported by the state). Rather, *Fordice* requires the elimination of continuing *policies* from the *de jure* era with segregative effects, and which are educationally unjustifiable. It does *not* require the elimination of the effects (like racial identifiability) themselves, even where those effects no doubt influence private choice. *Fordice*, 505 U.S. at 746 (Thomas, J., concurring) ("[W]e focus on the specific *policies* alleged to produce racial imbalance, rather than on the *imbalance* itself" (emphasis in original)).

Housing presents a situation simply not addressed in this Court's prior opinions. We believe it is closer to the contexts of *Bazemore* and *Fordice* than it is to the contexts of *Green* and *Paradise*. People choose themselves where to live, guided by economic and other factors. The state itself does not assign people to neighborhoods. Thus, elimination of racial identifiability is not needed as a prophylactic to insure that current state practices are non-discriminatory, even though it influences private choice to some degree.

Of course, where *public* or *subsidized* housing is at issue, as it is in this case, private choice will be influenced by the absence of such housing in particular neighborhoods. Thus, it may be appropriate in such cases to insure that public and/or subsidized housing is available in all parts of a jurisdiction that has previously relegated it to one area. Like the elimination of segregative policies traceable to the *de jure* era in *Fordice*, such measures simply insure that private choice is truly free and not

improperly influenced by anachronistic state policies that foster segregation.

Under this analysis, the difference between the Second Supplemental Long Term Plan Order and the Third Supplemental Long Term Plan Order is crucial. The Second Supplemental order provided that Yonkers would get credit for providing a housing opportunity where "the *location* of the unit furthers the integrative purposes of the LTPO." App. 181a (emphasis added). The creation of such units permits integrative private choices and precisely remedies the Constitutional violation: relegating public housing to one area for racial reasons. *Cf. United States v. Yonkers Bd. of Education*, 837 F.2d at 1236 (district court's order to construct family housing outside of Southwest Yonkers "is closely tailored to the City's constitutional violations and intrudes no more than necessary on the City's prerogatives, consistent with ensuring that some remedial action will in fact occur"). The city's Fourteenth Amendment obligations would be complete under a *Fordice* analysis. In the Third Supplemental order, though, the city only gets credit for moves that meet the District Court's race-conscious standard of "integrative." The purpose is not just to eliminate the municipal policies that foster segregation, but to eliminate the *de facto* segregation itself, and to do so through unambiguously race-conscious means.

This Court should grant the petition in order to clarify the requirements of the Fourteenth Amendment in the housing context. More specifically, this Court should determine whether the elimination of *de facto* segregated neighborhoods is an obligation of state actors whose past discrimination has fostered such neighborhoods even after those state actors are using race-neutral rules and have

eliminated policies that limited private integrative choices.

3. Finally, even if the race-conscious subsidy policy had been voluntarily adopted by the City of Yonkers, and not imposed upon it by the District Court, it is still doubtful that it would pass muster under "strict scrutiny." Just as not everything causally related to past discrimination is a "vestige" that *must* be eliminated to comply with the Fourteenth Amendment, so, too, not everything causally related to past discrimination is a "present effect" that *can* be eliminated using blunt policies that treat people differently on the basis of race.

Plainly, by itself, racial balance is an inappropriate goal. *Bakke*, 438 U.S. at 307 (Powell, J.) (medical school's efforts to assure a particular percentage of minorities within its student body was a "facially invalid" justification for racial preferences in admission; indeed, it was "discrimination for its own sake"). The lower courts have suggested that racial balance is not appropriate even in a university that was part of a *de jure* system. In both *Podberesky* and *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), the courts examined racial preferences in schools that had previously been entirely segregated and that were still predominantly white. In each instance, the court of appeals found the system of racial preferences -- a scholarship only for African Americans in *Podberesky* and a system of admissions preferences for African Americans and Mexican Americans in *Hopwood* -- unconstitutional, and in each instance, the court of appeals concluded that certain effects of the past *de jure* system, even were they proven to exist, were simply not remediable through race-conscious policies.

Each school claimed that the system of racial pref-

erences was needed to counter the "bad reputation" that the school had among minorities due to its legacy as a "white school" in the earlier *de jure* system. Rejecting that argument, each court pointed out that such a "justification" would permit the school to continue to use racial preferences indefinitely into the future, for as long as history books recounted the previous era. *Hopwood*, 78 F.3d at 952-53; *Podberesky*, 38 F.3d at 154.[4]

4. If racial identifiability in housing *is* a vestige or effect which should or can be remedied, then it would seem that the District Court in this case should be free to engage in more radical solutions if the current plan is ineffective. For example, the court could simply require Yonkers to pass a law preventing whites from buying or renting in majority white neighborhoods and minorities from buying or renting in majority minority neighborhoods. (Or, to approach the problem more gradually, preclude one of every five or ten people seeking to move to a home or apartment in Yonkers from making such moves.) If such a solution seems unduly restrictive of individual freedom, it deserves emphasis that the current remedy in the Third Supplemental order is just as restrictive to those who cannot afford to move without subsidy.

These "integrative" solutions go well beyond the

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[4] In *Podberesky*, the court also considered whether African Americans were "underrepresented," but the discussion makes clear that it would make a finding of "underrepresentation" only if African Americans were underrepresented in comparison to the body of *qualified* applicants. *Podberesky*, 38 F.3d at 156-57. That is, if the body of qualified applicants had a lower proportion of African Americans than the population as a whole, leading to fewer African Americans at the University of Maryland, the "racial identifiability" of the student body would *not* be a compelling governmental interest.

first priority of all remedial relief: to make injured individuals whole. Here, the primary persons in that category would be the Priority 1 applicants. Yet the remedy in the Third Supplemental order provides some relief for members of that group only if they are willing to make the integrative moves desired by the District Court, and not otherwise. *See also* n.3, *supra*. At the same time, the remedy provides benefits for Priority 2 and Priority 3 applicants who are unlikely victims of the City's past discrimination. In short, the remedy here elevates the remediation of racial identifiability over make whole relief to victims.

CONCLUSION

Not only is it questionable whether "racial identifiability" is the kind of "vestige" of past discrimination, the elimination of which is a constitutional *obligation* that a court can enforce, it is perhaps equally doubtful that it is the kind of past effect that state actors *can* remedy, under strict scrutiny, through racially-discriminatory means. That being said, this Court has not clearly articulated the distinction between a court's duty to eradicate the vestiges of past discrimination and the ability voluntarily to remedy the effects of past discrimination, and when the "racial identifiability" of a particular group falls into one category or the other. This Court should grant the petition and resolve these issues.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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